1992

The State of Utah v. Corey Lynn Brooks : Reply Brief of Appellant

Utah Court of Appeals

Jan Graham; Attorney general; J. Kevin Murphy; Assistant Attorney General; Attorneys for Appellee.
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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Appellee,	:	
v.	:	
COREY LYNN BROOKS,	:	Case No. 920853-CA Priority No. 2
Defendant.	:	

REPLY BRIEF OF APPELLANT

Appeal from judgments and convictions for Aggravated Robbery, a first degree felony, in violation of Utah Code Ann. section 76-6-302; Aggravated Burglary, a first degree felony, in violation of Utah Code Ann. section 76-6-203; and Possession of a Dangerous Weapon by a Restricted Person, a second degree felony, in violation of Utah Code Ann. section 76-10-503, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Kenneth Rigtrup, Judge, presiding.

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STATUTES AND CONSTITUTIONAL PROVISIONS

The following statutes and constitutional provisions are copied in Appendix 1 to this brief:

Constitution of Utah, Article I section 10
Constitution of Utah, Article VIII section 1
United States Constitution, Amendment VI
United States Constitution, Amendment XIV
Utah Code Ann. section 76-1-601
Utah Code Ann. section 76-6-202
Utah Code Ann. section 76-6-203
Utah Code Ann. section 76-6-302
Utah Code Ann. section 78-46-8
Utah Code Ann. section 78-46-15
Utah Rule of Appellate Procedure 11
Utah Rule of Appellate Procedure 25
Utah Rule of Criminal Procedure 18
Utah Rule of Evidence 606.

SUMMARY OF ARGUMENT

The time for the trial court to resolve juror Barber's incompetence was during the voir dire and the place for the trial court to resolve Mr. Barber's incompetence was on the record. Utah Rule of Criminal Procedure 18; Constitution of Utah, Article VIII section 1. Well established law regarding the need for fair jury trials counsels against condoning the post-

oath, off-the-record discussion of a juror's qualifications between the juror and the judge.

The trial court failed in his duty under Utah law to conduct an adequate voir dire to rebut the inference of bias attaching to the similar-crime-victim prospective jurors. Trial counsel did not request an adequate voir dire, but allowed two similar-crime-victim jurors to be seated on Mr. Brooks' jury, and used one of Mr. Brooks' peremptory challenges to remove a similar-crime-victim juror. This Court should reverse Mr. Brooks' convictions and order a new trial wherein the rudimentary law governing jury selection is applied.

Because the jury did not have to find that Mr. Brooks committed any voluntary bodily movement in convicting him of aggravated burglary that was not encompassed in the elements of aggravated robbery, Mr. Brooks' conviction for aggravated burglary should be stricken.

ARGUMENT

I.
THE JURY SELECTION ERRORS REQUIRE A NEW TRIAL.

A. THE BARBER AFFIDAVIT DEMONSTRATES THE NEED FOR A NEW TRIAL.

In response to Mr. Brooks' argument that he was denied his rights to a fair trial because juror Barber was incompetent to serve on his jury, the State's brief includes and relies on an ex parte affidavit which is not part of the record on appeal. The State has also filed a separate contingent motion

to include the affidavit in the record. Brief of appellee at 7, 16, Appendix III. This Court should reject the affidavit and strike the State's brief, admonishing the State that it is not above the law that matters included in appellate briefs which are not part of the record presented in the trial court will not be considered by the appellate courts. E.g. Utah Rules of Appellate Procedure 11 and 25; Watkins v. Simonds,385 P.2d 154 (Utah 1963).

Insofar as the affidavit seeks to shore up the verdict by addressing the internal deliberative process, the affidavit is inadmissible under Utah Rule of Evidence 606. See State v. DeMille, 756 P.2d 81 (Utah 1988). Cf. e.g. Tanner v. United States, 483 U.S. 107, 126 (1987).

Rather than obviating error, the ex parte affidavit calls into question the fundamental fairness of Mr. Brooks' jury trial. Mr. Brooks was supposed to have been tried in a court of record. Constitution of Utah, Article VIII section 1. The fact that the trial court apparently approached one of the jurors off the record is sufficient basis for the reversal of Mr. Brooks' conviction. See Birch v. Birch, 771 P.2d 1114, 1116 (Utah App. 1989)(failure to record proceedings justifies reversal).

In addition to demonstrating a violation of Mr. Brooks' right to be tried in a court of record, the affidavit raises a rebuttable presumption of prejudice to Mr. Brooks stemming from the trial court's discussion of personal matters bearing on the case with the juror. See State v. Pike, 712 P.2d 277 (Utah 1985)(citing Constitution of Utah, Article I section

10, United States Constitution, Amendments VI and XIV; holding that a rebuttable presumption of prejudice arises from anything more than incidental contact between jurors and court personnel); Logan City v. Carlsen, 799 P.2d 224 (Utah App. 1990)(explaining bases for the presumption: taint from contact is difficult to prove, contact gives rise to appearance of impropriety).

The affidavit is insufficient to rebut the prejudice it raises. Nowhere in the affidavit is there any indication that Mr. Barber was not influenced by the off-the-record encounter with the judge. Nor could Mr. Barber's opinion as to the impact of the encounter rebut the presumption of prejudice. See State v. Erickson, 749 P.2d 620 (Utah 1987)("the denial by the juror that he had been influenced by the encounter was not enough to overcome the presumption of prejudice.").

Even if the affidavit were properly in the record, it would not obviate the errors encompassed in seating Mr. Barber on Mr. Brooks' jury. The affidavit merely opines that Mr. Barber was not distracted from his service after he had made arrangements for his wife after the trial had begun, and does nothing to establish that Mr. Barber's service prior to the arrangements was adequate. The affidavit opines that Mr. Barber was not distracted by his need to take his wife to therapy because he had postponed her treatments. This does not resolve the bias reflected in his voir dire with the judge, wherein the judge asked him if the treatment schedule could be changed to fit the recesses in the trial, and wherein Mr. Barber maintained, "I

am not sure that I could devote my undivided attention to the case under the circumstances." (T2 29-31). Mr. Barber's assessment of the competency of his service is insufficient; jurors are not qualified to assess their own competency. State v. Thomas, 830 P.2d 243, 247 (Utah 1992)("This court has consistently held that the trial court, not the juror, must determine a juror's qualifications.").

Mr. Brooks agrees with the State that juror bias and juror incompetence are separate issues. Compare brief of appellant at 7 ("juror competency is separate issue from juror impartiality.") with brief of appellee at 14 ("Competence does not, as defendant seems to argue, deal with juror 'bias.'"). Utah Rule of Criminal Procedure 18(e)(14) allows for challenges for cause in the event of juror bias or incompetence, and applies in this case wherein Mr. Barber's distraction relating to his wife's injury, or "mental disability" resulted in his inability to act "without prejudice to the substantial rights" of Mr. Brooks to a competent jury.

The State seeks to minimize Mr. Barber's incompetence, stating, "Barber only stated that he had a schedule conflict, posed by his wife's physical therapy appointments, that might cause him to be less than fully attentive at trial (R. 270)." Brief of appellee at 14. The record demonstrates that Mr. Barber's concerns were more than a mere scheduling conflict. It was in response to the court's question about the ability to provide satisfactory jury service that Mr. Barber indicated under

oath that his wife had had knee surgery and that he had to take her to therapy. When the court asked if other arrangements could be made, Mr. Barber maintained that he had been unable to arrange to have someone else take her to therapy. When the court asked Mr. Barber if he was trying to make other arrangements, Mr. Barber did not relent, but indicated, "Well, she has until -- a week from today she goes in to the doctor to see if the therapy is successful." The court asked again if other arrangements could be made, and Mr. Barber told the court, "I don't have anyone I could trust with her." The court asked if Mr. Barber had tried to reschedule the therapy and Mr. Barber said that he had not. The court informed Mr. Barber about the court's normal recess schedule, and asked if Mr. Barber could work with that schedule. Mr. Barber stated, "I am not sure that I could devote my undivided attention to the case under the circumstances." (T2. 29-31).

The State argues that because Mr. Barber's disability did not indicate a bias to either side, the court "could not possibly predict which party would be prejudiced by the distraction" and that the trial court could fairly assume that the prejudice stemming from the disability would be borne equally between the parties, and allow Mr. Barber to serve on the jury. Brief of appellee at 15. The fact that a juror's lack of qualification may harm both parties does not absolve the trial court of his responsibility to see that the jury seated comports with statutory and constitutional requirements. Mr. Barber's

service prejudiced Mr. Brooks' substantial constitutional right to a competent jury. E.g. Tanner v. United States, 483 U.S. 107, 126 (1987).

The State argues that Mr. Barber's incompetence falls under Utah Code Ann. section 78-46-15, which allows jurors to be excused on the grounds of hardship. The State argues that the hardship statute constitutes a statutory exemption from service, and argues that as an exemption, the hardship privilege must be raised by the prospective juror. Brief of appellee at 16 (citing Utah Rule of Criminal Procedure 18(h)). The hardship statute does not constitute a statutory exemption from jury service, but merely gives trial courts the discretion to excuse jurors. Because Mr. Brooks has a right to a mentally competent jury, which was compromised by Mr. Barber's service, Mr. Brooks has standing to raise the issue.

The Barber affidavit, recording the trial court's off-the-record efforts to correct the errors of seating Mr. Barber, demonstrates that it should have been plain to the trial court during the voir dire that Mr. Barber was not competent to serve, and that trial counsel was objectively deficient in failing to challenge juror Barber. This Court should reverse Mr. Brooks' conviction and order a new trial.

B. THE SERVICE OF JURORS PIKE AND HEAP REQUIRE A NEW TRIAL.

Mr. Brooks is arguing that the trial court committed plain error, and that trial counsel was constitutionally deficient because jurors Pike and Heap were seated on the jury in

the absence of voir dire concerning their past victimization of the crimes at issue in this case. In response, the State posits that the trial court acted within his discretion in protecting juror privacy from probing on the topic. Brief of appellee at 17-18. The State argues similarly that trial counsel should be presumed to have made a tactical choice to cater to the jurors' privacy in failing to demand voir dire on the jurors' victimization. Brief of appellee at 29-30. The State's arguments overlook the trial court's duty to see to it that the voir dire of prospective jurors is constitutionally adequate, e.g., State v. Ellifritz, 835 P.2d 170, 175 (Utah App. 1992), and trial counsel's duties to investigate before making tactical choices, e.g. Strickland v. Washington, 466 U.S. 668, 690-691 (1984). When a defendant's right to an impartial jury clashes with a prospective juror's right to privacy, the defendant's right must prevail, particularly in light of the availability of in camera voir dire. E.g. State v. Ball, 685 P.2d 1055 (Utah 1984).

The State's argument that the trial court and trial counsel were properly protecting the privacy of jurors Pike and Heap in failing to probe their presumptive prejudice is nonsensical particularly on this record, wherein the trial court and trial counsel did investigate similar biases with other prospective jurors (T2 75-85).

The State argues that the trial court acted within his discretion in inquiring into prior crimes experience only

with those jurors who had been victims of violent assaultive conduct, and that the court's failure to inquire into Mr. Pike's and Mr. Heap's prior crimes experience is justified because they were merely burglarized but not directly assaulted. Brief of appellee at 19. Because the trial court did not ask jurors Pike and Heap about their prior victimizations, it cannot be said that they were not "direct" victims or victims of violence or assault. More importantly, the trial court's duty to rebut the inference of bias attaching to similar-crime-victim jurors applies to all prospective jurors with similar crimes experience, not just to "direct" victims or violent crime victims. E.g. State v. Wooley, 810 P.2d 440 (Utah App.), cert. denied, 826 P.2d 65 (Utah 1991).

The State argues that the voir dire of jurors Pike and Heap was adequate because neither juror indicated a bias when the trial court asked the potential jurors if there was anything that might cause them to be biased. Brief of appellee at 19. The law in Utah is that jurors are not competent to assess their own biases, and that it is the duty of the trial court to sufficiently probe juror biases to rebut presumptive biases and to allow for the intelligent exercise of peremptory and for-cause challenges. See opening brief of appellant at 5-7, 13-16.

The State argues that there should be no inference of bias attaching to prospective jurors who have suffered crimes similar to those to be tried, noting that the Utah Legislature has stated its intention to allow all qualified citizens to serve as jurors. The State argues that the inference of bias attaching

to similar-crime-victim jurors involves judicial circumvention of the intention of the legislature, and therefore violates the doctrine of separation of governmental powers. Brief of appellee at 20. The legislature has expressly and appropriately placed the burden on the courts to insure that constitutional rights to impartial juries are respected. E.g. Utah Code Ann. section 78-46-8. The Utah Courts' well-established tradition of recognizing a rebuttable inference of bias attaching to similar-crime-victim jurors is consistent with this responsibility, and in no way infringes on prospective jurors' right to participate in the jury system if they are qualified to do so.

C. THE USE OF A PEREMPTORY CHALLENGE TO REMOVE JUROR GEURTS, IN THE ABSENCE OF SUFFICIENT VOIR DIRE, CALLS FOR A NEW TRIAL.

Mr. Brooks is arguing that prospective juror Geurts should have been removed for cause, or examined by the trial court until the inference of bias attaching to her, as a victim of crimes similar to those at issue here. He is also arguing that the use of his peremptory challenge to remove this juror was reversible error. Mr. Brooks is asserting the plain error and ineffective assistance of counsel doctrines in addressing this issue. In response, the State argues that no obvious error occurred because juror Geurts may have been biased against the prosecution because her husband was a defense witness in a separate trial tried by Mr. Brooks' prosecutor. The State also notes that juror Geurts shared the same religious affiliation with the prosecutor. Ms. Geurts' husband's prior participation in another case, and Ms. Geurts' religious affiliation have

nothing to do with the trial court's duties to investigate the inference of bias attaching to jurors who have suffered crimes similar to those to be tried, or to remove the jurors. E.g. Wooley.

D. REVERSAL IS APPROPRIATE.

The State argues that this Court should condone the voir dire in this case because the trial court and trial counsel had an "advantaged view," and did not seek additional voir dire or challenge the similar-crimes-victim jurors for cause. Brief of appellee at 22, citing State v. Ellifritz, 835 P.2d 170 (Utah App. 1992). In contrast to the Ellifritz record, the overall voir dire in this case demonstrates that the trial court and trial counsel failed to apply the law guaranteeing Mr. Brooks competent jurors, requiring trial courts to insure the impartiality of jurors by conducting adequate jury selection proceedings, and requiring defense counsel to protect their clients' rights in jury selection proceedings. While the trial court and trial counsel did have direct access to the potential jurors, because of an apparent unawareness of the governing law, the trial court and trial counsel did not use their opportunity to examine the jurors as the law required. Because the record demonstrates that the trial court and counsel failed in their legal responsibilities during the voir dire, a new trial is appropriate.

The State theorizes that the courts need not concern themselves with juror bias because Utah felony juries exceeds

federal standards in the number of jurors who participate in felony juries, and that the larger number of jurors improves the possibilities that some juror biases will be offset by other juror biases. The State then speculates that the biases of jurors Pike, Heap and Geurts were likely offset by pro-defense biases of the other five jurors. Brief of appellee at 23-24. There is no basis in the record for the State's theory, which is contradicted by the verdicts. The fact that the Utah Constitution calls for greater protection of jury rights than federal standards does not diminish the trial courts' duties to insure jury rights. The State's argument is inconsistent with Utah case law, which law is consistent with the greater protection afforded by the Utah Constitution, in exhorting trial courts to exceed federal minimum standards in conducting jury voir dire. E.g. State v. James, 819 P.2d 781 (Utah 1991).

The State indicates its intention to ask the Utah Supreme Court to overrule the law that it is reversible error to force a defendant to utilize a peremptory challenge to remove a juror who should have been removed for cause. Brief of appellee at 25-26. Inasmuch as the State is not asking this Court to address the matter, suffice it to say that peremptory challenges are substantial rights necessary to a defendant's obtaining a fair trial, and that the compromise of such a right properly calls for reversal. See e.g. State v. Young, 208 Utah Adv. Rep. 6, 11 (Utah 1993).

In addressing the ineffective assistance of counsel

argument, the State argues that trial counsel participated adequately. Brief of appellee at 28. The service of jurors Barber, Pike and Heap, and the peremptory challenge of Geurts, in the absence of even a request for adequate voir dire, contradicts the State's argument. The State argues that trial counsel's failure to request voir dire of the jurors should be condoned as valid tactical performance because probing the jurors may have angered them and prejudiced them against Mr. Brooks. Brief of appellee at 29-30. The record contradicts the State's speculation, because trial counsel did probe some of the jurors; there is nothing in the record indicating that counsel was acting under any apprehension of offending the jurors with voir dire questions. Had there been a danger of angering the jurors, trial counsel could have made a request outside the panelists' presence for the court to conduct additional voir dire. An attorney cannot make a valid tactical choice to allow biases recognized by law to go uninvestigated, and to allow incompetent and presumptively biased jurors to participate on his client's case. See brief of appellant at 19-21.

The State argues that no plain error or ineffective assistance of counsel occurred in the in the jury selection process because Mr. Brooks has shown no likelihood of a more favorable result. Brief of appellee at 22. Mr. Brooks is unable to make an evidentiary assessment of prejudice stemming from the jury selection errors because it cannot be known how the participation of different jurors would have influenced the

deliberations. When there are fundamental structural errors such as this, prejudice should be presumed. See brief of appellant at 20-23. Cf. Vasquez v. Hillery, 474 U.S. 254, 263 (1986)(Court could not rely on defendant's conviction to apply harmless error analysis to racial discrimination in the selection of the grand jury, because Court could not determine whether the defendant would have been indicted at all in the absence of the error in the grand jury proceedings).

II.
THIS COURT SHOULD STRIKE THE AGGRAVATED BURGLARY CONVICTION.

Mr. Brooks is arguing that the aggravated burglary conviction should be stricken because it did not involve a separate act from the acts essential to the aggravated robbery conviction, as the term act is defined by Utah Code Ann. section 76-1-601(1) (a voluntary bodily movement). Brief of appellant at 23-27. In response, the State argues, "The Utah Supreme Court has squarely rejected defendant's argument that 'remaining' is not an 'act' for the purposes of the burglary statute. See State v. Bradley, 752 P.2d 974, 876 (Utah 1985, amended on rehearing 1988)." Brief of appellee at 34. A copy of the Bradley decision is in appendix 2 to this brief. Nowhere in the Bradley decision does the Utah Supreme Court address the question.

In order to convict one of aggravated burglary, the State must prove that one entered or remained unlawfully in a building with the intent to commit a felony with a firearm. Utah Code Ann. sections 76-6-202 and 203. It was the State's theory

in this case that Mr. Brooks remained unlawfully in the Vert residence; there was no evidence that Mr. Brooks entered the Vert residence unlawfully -- he did so with the consent of Stephanie Vert. Because remaining is not a voluntary bodily movement, it is not an act under the Utah Code justifying a separate conviction bearing a five to life prison sentence. Because on the facts of this case, the jurors were not required to find that Mr. Brooks committed any act for the aggravated burglary conviction that was not already committed for the aggravated robbery conviction, this Court should reverse the aggravated robbery conviction. See Bradley.

CONCLUSION

This Court should reverse Mr. Brooks' convictions and order a new trial.

Respectfully submitted this 11 day of May, 1993.

ELIZABETH HOLBROOK
Attorney for Mr. Brooks

CERTIFICATE OF DELIVERY

I, Elizabeth Holbrook, hereby certify that I have caused to be served eight copies of the foregoing to the Utah Court of Appeals and four copies of the foregoing to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah, 84114, this 17 day of May, 1993.

ELIZABETH HOLBROOK
Attorney for Mr. Brooks

DELIVERED this ____ day of May, 1993.

APPENDIX 1

Statutes and Constitutional Provisions

Article I, Section 10 of the Constitution of Utah provides:

> **Sec. 10. [Trial by jury.]**
> In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.

Article VIII, Section 1 of the Constitution of Utah provides:

> **Sec. 1. [Judicial powers--Courts.]**
> The judicial power of the state shall be vested in a supreme court, in a trial court of general jurisdiction known as the district court, and in such other courts as the Legislature by statute may establish. The Supreme Court, the district court, and such other courts designated by statute shall be courts of record. Courts not of record shall also be established by statute.

Amendment VI to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

Amendment XIV to the Constitution of the United States provides:

> **Section 1.**
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Section 5.
The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Utah Code Ann. section 76-1-601 provides:

76-1-601. Definitions.
Unless otherwise provided, the following terms apply to this title:
(1) "Act" means a voluntary bodily movement and includes speech.
(2) "Actor" means a person whose criminal responsibility is in issue in a criminal action.
(3) "Bodily injury" means physical pain, illness, or any impairment of physical condition.
(4) "Conduct" means an act or omission.
(5) "Dangerous weapon" means any item capable of causing death or serious bodily injury, or a facsimile or representation of the item, and:
(a) the actor's use or apparent intended use of the item leads the victim to reasonably believe the item is likely to cause death or serious bodily injury; or
(b) the actor represents to the victim verbally or in any other manner that he is in control of such an item.
(6) "Offense" means a violation of any penal statute of this state.
(7) "Omission" means a failure to act when there is a legal duty to act and the actor is capable of acting.
(8) "Person" means an individual, public or private corporation, government, partnership, or unincorporated association.
(9) "Possess" means to have physical possession of or to exercise dominion or control over tangible property.
(10) "Serious bodily injury" means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death.

Utah Code Ann. section 76-6-202 provides:

> **76-6-202. Burglary.**
> (1) a person is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit a felony or theft or commit an assault on any person.
> (2) Burglary is a felony of the third degree unless it was committed in a dwelling, in which event it is a felony of the second degree.

Utah Code Ann. section 76-6-203 provides:

> **76-6-203. Aggravated burglary.**
> (1) A person is guilty of aggravated burglary if in attempting, committing, or fleeing from a burglary the actor or another participant in the crime:
> (a) causes bodily injury to any person who is not a participant in the crime;
> (b) uses or threatens the immediate use of a dangerous weapon against any person who is not a participant in the crime; or
> (c) possesses or attempts to use any explosive or dangerous weapon.
> (2) Aggravated burglary is a first degree felony.
> (3) As used in this section, "dangerous weapon" has the same definition as under Section 76-1-601.

Utah Code Ann. section 76-6-302 provides:

> **76-6-302. Aggravated robbery.**
> (1) A person commits aggravated robbery if in the course of committing robbery, he:
> (a) uses or threatens to use a dangerous weapon as defined in Section 76-1-601; or
> (b) causes serious bodily injury upon another.
> (2) Aggravated robbery is a first degree felony.
> (3) For the purposes of this part, an act shall be considered to be "in the course of committing a robbery" if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

Utah Code Ann. section 78-46-8 provides:

> **78-46-8. Determination on juror qualification--Persons not competent to serve as jurors.**
>
> (1) The court, on its own initiative or when requested by a prospective juror, shall determine whether the prospective juror is disqualified from jury service. The court shall base its decision on the information provided on the juror qualification form, or by interview with the prospective juror or other competent evidence. The clerk shall enter the court's determination on the juror qualification form and on the alphabetical list of names drawn from the master jury wheel.
>
> (2) The following persons are not competent to serve as jurors:
>
> (a) a person who has been convicted of a felony;
>
> (b) a person serving on active duty in the military service of the United States;
>
> (c) a person who is not capable because of physical or mental disability of rendering satisfactory jury service. Any person who claims this disqualification may be required to submit a physician's certificate verifying the disability and the certifying physician is subject to inquiry by the court at its discretion; or
>
> (d) a person who does not meet the requirements of Section 78-46-7.

Utah Code Ann. section 78-46-15 provides:

> **78-46-15. Excuse from jury service.**
>
> (1) The court, upon request of a prospective juror or on its own initiative, shall determine on the basis of information provided on the juror qualification form or by interview with the prospective juror, or by other competent evidence, whether the prospective juror should be excused from jury service. The clerk shall enter this determination in the space provided on the juror qualification form.
>
> (2) A person may be excused from jury service by the court, at its discretion, upon a showing of undue hardship, extreme inconvenience, or public necessity for any period the court deems necessary.

Rule 11, Utah Rules of Appellate Procedure provides:

Rule 11. The record on appeal.

(a) **Composition of the record on appeal.** The original papers and exhibits filed in the trial court, the transcript of proceedings, if any, the index prepared by the clerk of the trial court, and where available the docket sheet, shall constitute the record on appeal in all cases. A copy of the record certified by the clerk of the trial court to conform to the original may be substituted for the original as the record on appeal. Only those papers prescribed under paragraph (d) of this rule shall be transmitted to the appellate court.

(b) **Pagination and indexing of record.** Immediately upon filing of the notice of appeal, the clerk of the trial court shall paginate all of the original papers and any transcript filed in that court in chronological order and shall prepare a chronological index of those papers. The index shall contain a reference to the date on which the paper was filed in the trial court and the starting page of the record on which the paper will be found. Clerks of the trial and appellate courts shall establish rules and procedures for checking out the record after pagination for use by the parties in preparing briefs for an appeal or in preparing or briefing a petition for writ of certiorari.

(c) **Duty of appellant.** After filing the notice of appeal, the appellant, or in the event that more than one appeal is taken, each appellant, shall comply with the provisions of paragraphs (d) and (e) of this rule and shall take any other action necessary to enable the clerk of the trial court to assemble and transmit the record. A single record shall be transmitted.

(d) **Papers on appeal.**

(1) **Criminal cases.** All of the papers in a criminal case shall be included by the clerk of the trial court as part of the record on appeal.

(2) **Civil cases.** In all civil cases, the papers to be transmitted shall consist of the following.

(A) **Civil cases with short records.** In civil cases where all the papers total fewer than 300 pages, all of the papers will be transmitted to the appellate court upon completion of the filing of briefs. In such cases,

the appellant shall serve upon the clerk of the trial court, simultaneously with the filing of appellant's reply brief, notice of the date on which appellant's reply brief was filed. If appellant does not intend to file a reply brief, appellant shall notify the clerk of the trial court of that fact within 30 days of the filing of appellee's brief.

(B) **All other civil cases.** In all other civil cases where the papers are or exceed 300 pages, all parties shall file with the clerk of the trial court, within 10 days after briefing is completed, a joint or separate designation of those papers referred to in their respective briefs. Only those designated papers and the following, to the extent applicable, shall be transmitted to the clerk of the appellate court by the clerk of the trial court:

(i) the pleadings as defined in Rule 7(a), Utah Rules of Civil Procedure;

(ii) the pretrial order if any;

(iii) the final judgment, order, or interlocutory order from which the appeal is taken;

(iv) other orders sought to be reviewed, if any;

(v) any supporting opinion, findings of fact or conclusions of law filed or delivered by the trial court;

(vi) the motion, response, and accompanying memoranda upon which the court rendered judgment, if any;

(vii) jury instructions given, if any;

(viii) jury verdicts and interrogatories, if any;

(ix) the notice of appeal.

(3) **Agency cases.** Where all papers in the agency record total fewer than 300 pages, the agency shall transmit all papers to the appellate court. Where all papers in the agency record total 300 or more pages, the parties shall, within 10 days after

briefing is completed, file with the agency a joint or separate designation of those papers necessary to the appeal. The agency shall transmit those designated papers to the appellate court. Instead of filing all papers or designated papers, the agency may, with the approval of the court, file only the chronological index of the record or of such parts of the record as the parties may designate. All parts of the record retained by the agency shall be considered part of the record on review for all purposes.

(e) **The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered.**

(1) **Request for transcript; time for filing.** Within 10 days after filing the notice of appeal, the appellant shall request from the reporter a transcript of such parts of the proceedings not already on file as the appellant deems necessary. The request shall be in writing, and, within the same period, a copy shall be filed with the clerk of the trial court and the clerk of the appellate court. If no such parts of the proceedings are to be requested, within the same period the appellant shall file a certificate to that effect with the clerk of the trial court and a copy with the clerk of the appellate court. If there are no reporter but the proceedings were otherwise recorded, the appellant shall request from a court transcriber certified in accordance with the rules and procedures of the Judicial Council a transcript of such parts of the proceeding not already on file as the appellant deems necessary. By stipulation of the parties approved by the appellate court, a person other than a certified court transcriber may transcribe a recorded hearing. The clerk of the appellate court shall, upon request, provide a list of all certified court transcribers. The transcriber is subject to all of the obligations imposed on reporters by these rules.

(2) **Transcript required of all evidence regarding challenged finding or conclusion.** If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the

record a transcript of all evidence relevant to such finding or conclusion.

(3) **Statement of issues; cross-designation by appellee.** Unless the entire transcript is to be included, the appellant shall, within 10 days after filing the notice of appeal, file a statement of the issues that will be presented on appeal and shall serve on the appellee a copy of the request or certificate and a copy of the statement. If the appellee deems a transcript of other parts of the proceedings to be necessary, the appellee shall, within 10 days after the service of the request or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of such designation the appellant has requested such parts and has so notified the appellee, the appellee may within the following 10 days either request the parts or move in the trial court for an order requiring the appellant to do so.

(4) **Payment of reporter.** At the time of the request, a party shall make satisfactory arrangements with the reporter or transcriber for payment of the cost of the transcript.

(f) **Agreed statement as the record on appeal.** In lieu of the record on appeal as defined in paragraph (a) of this rule, the parties may prepare and sign a statement of the case, showing how the issues presented by the appeal arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the trial court may consider necessary fully to present the issues raised by the appeal, shall be approved by the trial court. The clerk of the trial court shall transmit the statement to the clerk of the appellate court within the time prescribed by Rule 12(b)(2). The clerk of the trial court shall transmit the index of the record to the clerk of the appellate court upon approval of the statement by the trial court.

(g) **Statement of evidence or proceedings when no report was made or when transcript is unavailable.** If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including recollection. The statement shall be served on the appellee, who may serve objections or propose amendments within 10 days after service. The statement and any objections or proposed amendments shall be submitted to the trial court for settlement and approval and, as settled and approved, shall be included by the clerk of the trial court in the record on appeal.

(h) **Correction or modification of the record.** If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated, the parties by stipulation, the trial court, or the appellate court, either before or after the record is transmitted, may direct that the omission or misstatement be corrected and if necessary that a supplemental record be certified and transmitted. The moving party, or the court if it is acting on its own initiative, shall serve on the parties a statement of the proposed changes. Within 10 days after service, any party may serve objections to the proposed changes. All other questions as to the form and content of the record shall be presented to the appellate court. (Amended effective October 1, 1992.)

Rule 25, Utah Rules of Appellate Procedure provides:

Rule 25. Brief of an amicus curiae or guardian ad litem.

A brief of an amicus curiae or of a guardian ad litem representing a minor who is not a party to the appeal may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae or the guardian ad litem is desirable. Except as all parties otherwise consent, an amicus curiae or

guardian ad litem shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus curiae or guardian ad litem will support, unless the court for cause shown otherwise orders. A motion of an amicus curiae or guardian ad litem to participate in the oral argument will be granted when circumstances warrant in the court's discretion.

Rule 18, Utah Rules of Criminal Procedure provides:

Rule 18. Selection of jury.

(a) The clerk shall draw by lot and call the number of the jurors that are to try the cause plus such an additional number as will allow for all peremptory challenges permitted. After each challenge for cause sustained, another juror shall be called to fill the vacancy before further challenges are made, and any such new juror may be challenged for cause. When the challenges for cause are completed, the clerk shall make a list of the jurors remaining, and each side, beginning with the prosecution, shall indicate thereon its peremptory challenge to one juror at a time in regular turn, as the court may direct, until all peremptory challenges are exhausted or waived. The clerk shall then call the remaining jurors, or so many of them as shall be necessary to constitute the jury, in the order in which they appear on the list, and the persons whose names are so called shall constitute the jury.

(b) The court may permit counsel or the defendant to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court may permit counsel or the defendant to supplement the examination by such further inquiry as it deems proper, or may itself submit to the prospective jurors additional questions requested by counsel or the defendant.

(c) A challenge may be made to the panel or to an individual juror.

(1) The panel is a list of jurors called to serve at a particular court or for the trial of a particular action. A challenge to the panel is an objection made to all jurors summoned and may be taken by either party.

(i) A challenge to the panel can be founded only on a material departure from the procedure prescribed with respect to the selection, drawing, summoning and return of the panel.

(ii) The challenge to the panel shall be taken before the jury is sworn and shall be in writing or recorded by the reporter. It shall specifically set forth the facts constituting the grounds of the challenge.

(iii) If a challenge to the panel is opposed by the adverse party, a hearing may be had to try any question of fact upon which the challenge is based. The jurors challenged, and any other persons, may be called as witnesses at the hearing thereon.

(iv) The court shall decide the challenge. If the challenge to the panel is allowed, the court shall discharge the jury so far as the trial in question is concerned. If a challenge is denied, the court shall direct the selection of jurors to proceed.

(2) A challenge to an individual juror may be either peremptory or for cause. A challenge to an individual juror may be made only before the jury is sworn to try the action, except the court may, for good cause, permit it to be made after the juror is sworn but before any of the evidence is presented. In challenges for cause the rules relating to challenges to a panel and hearings thereon shall apply. All challenges for cause shall be taken first by the prosecution and then by the defense.

(d) A peremptory challenge is an objection to a juror for which no reason need be given. In capital cases, each side is entitled to 10 peremptory challenges. In other felony cases each side is entitled to four peremptory challenges. In misdemeanor cases, each side is entitled to three peremptory challenges. If there is more than one defendant the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

(e) The challenge for cause is an objection to a particular juror and may be taken on one or more of the following grounds:

(1) want of any of the qualifications prescribed by law;

(2) any mental or physical infirmity which renders one incapable of performing the duties of a juror;

(3) consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted;

(4) the existence of any social, legal, business, fiduciary or other relationship between the prospective juror and any party, witness or person alleged to have been victimized or injured by the defendant, which relationship when viewed objectively, would suggest to reasonable minds that the prospective juror would be unable or unwilling to return a verdict which would be free of favoritism. A prospective juror shall not be disqualified solely because he is indebted to or employed by the state or a political subdivision thereof;

(5) having been or being the party adverse to the defendant in a civil action, or having complained against or having been accused by him in a criminal prosecution;

(6) having served on the grand jury which found the indictment;

(7) having served on a trial jury which has tried another person for the particular offense charged;

(8) having been one of a jury formally sworn to try the same charge, and whose verdict was set aside, or which was discharged without a verdict after the case was submitted to it;

(9) having served as a juror in a civil action brought against the defendant for the act charged as an offense;

(10) if the offense charged is punishable with death, the entertaining of such conscientious opinions about the death penalty as would preclude the juror from voting to impose the death penalty following conviction regardless of the facts;

(11) because he is or, within one year preceding, has been engaged or interested in carrying on any business, calling or employment, the carrying on of which is a violation of law, where defendant is charged with a like offense;

(12) because he has been a witness, whether for or against the defendant on the preliminary examination or before the grand jury;

(13) having formed or expressed an unqualified opinion or belief as to whether the defendant is guilty or not guilty of the offense charged; or

(14) that a state of mind exists on the part of the juror with reference to the cause, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals or common notoriety, if it satisfactorily appears to the court that the juror can and will, notwithstanding such opinion, act impartially and fairly upon the matter to be submitted to him.

(f) Peremptory challenges shall be taken first by the prosecution and then by the defense alternately. Challenges for cause shall be completed before peremptory challenges are taken.

(g) The court may direct that alternate jurors be impanelled. Alternate jurors, in the order in which they are called, shall replace jurors who are, or become, unable or disqualified to perform their duties. The prosecution and defense shall each have one additional peremptory challenge for each alternate juror to be chosen.

Alternate jurors shall have the same qualifications, take the same oath and enjoy the same privileges as regular jurors.

(h) A statutory exemption from service as a juror is a privilege of the person exempted and is not a ground for challenge for cause.

(i) When the jury is selected an oath shall be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between the parties, and render a true verdict according to the evidence and the instructions of the court.

Rule 606, Utah Rules of Evidence provides:

> **Rule 606. Competency of juror as witness.**
>
> (a) **At the trial.** A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.
>
> (b) **Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes. (Amended effective October 1, 1992.)

APPENDIX 2

Bradley Opinion

The STATE of Utah, Plaintiff and Respondent,

v.

Kenneth D. BRADLEY, Defendant and Appellant.

No. 20308.

Supreme Court of Utah.

Sept. 23, 1985.

As Amended on Rehearing March 15, 1988.

Defendant was convicted in the Third District Court, Salt Lake County, Homer F. Wilkinson, J., of aggravated assault, aggravated burglary, and tampering with a witness, and he appealed. The Supreme Court held that: (1) conviction of tampering with witness would be sustained on evidence indicating that defendant wanted to stop victim from involving herself with any official proceeding or litigation defendant believed was underway, and on rehearing, held that: (2) aggravated assault was lesser included offense of aggravated burglary, on instructions given and evidence presented, and assault conviction would thus be reversed.

Reversed in part and otherwise affirmed.

1. Assault and Battery ⇐54, 71

Offense of aggravated assault amounted to an attempt, with unlawful force or violence, to do bodily injury to another, or a threat of bodily injury to another accompanied by a show of immediate force or violence and was established as against defendant notwithstanding that it was defendant's companion and not defendant who held weapon to victim during incident giving rise to offense. U.C.A.1953, 76–2–202, 76–5–102.

2. Burglary ⇐15

Consent manifested by victim when he opened door to defendant, who he believed had come to his house for lawful purpose, was limited to that purpose and did not, in context of charge of aggravated burglary, authorize defendant to order victim out of house at gunpoint. U.C.A.1953, 76–6–202.

3. Burglary ⇐15

A consent to enter limited as to place, time, or purpose is not a defense to burglary where entry occurs outside limitations stated or implied. U.C.A.1953, 76–6–202.

4. Burglary ⇐41(4)

Element of unlawful entry was established with respect to crime of aggravated burglary on evidence indicating that defendant entered or remained unlawfully in victim's home with intent to commit an assault. U.C.A.1953, 76–6–202.

5. Obstructing Justice ⇐4

Crime of tampering with a witness requires no more than that a defendant believe an official proceeding or investigation to be underway. U.C.A.1953, 76–8–508.

6. Obstructing Justice ⇐16

Conviction of tampering with witness was sustained on evidence indicating that defendant wanted to stop victim from involving herself with any official proceeding or litigation he believed was underway. U.C.A.1953, 76–8–508.

7. Criminal Law ⇐29

When a defendant has improperly been convicted of both the greater and the included offense, the conviction on the included offense is treated as mere surplusage, and the conviction of the greater offense remains unaffected.

On Petition For Rehearing

8. Indictment and Information ⇐191(2)

As theoretical proposition, defendant could commit aggravated burglary without committing aggravated assault, as aggravated burglary may require no more than that burglar be armed with deadly weapon and being armed with deadly weapon would not, in and of itself, amount to assault, but when element that burglar uses or threatens immediate use of dangerous or deadly weapon against any person who is not participant in crime is relied upon by prosecution to prove aggravated burglary, aggravated assault is simultaneously prov-

en, for purposes of determining whether aggravated assault is lesser included offense of aggravated burglary. U.C.A. 1953, 76–5–103(1)(b), 76–6–203(b, c).

9. Indictment and Information ⇐191(2)

Aggravated assault was lesser included offense of aggravated burglary in prosecution in which defendant was convicted of both offenses, and reversal of assault conviction was accordingly required; instructions on aggravated burglary included element that defendant used or threatened immediate use of dangerous or deadly weapon against any person, and comparing instructions on aggravated burglary and aggravated assault, jury did not have to find any additional elements for conviction of aggravated assault beyond elements of crime of aggravated burglary; evidence was that defendant, with two companions, entered victim's home at victim's invitation, and that one of the companions pulled victim's shotgun from rack on the wall, drew pistol from his waist, and pointed it at victim's head. U.C.A.1953, 76–5–103(1)(b), 76–6–203(b).

John C. Green, Salt Lake City, for defendant and appellant.

David L. Wilkinson, Atty. Gen., Salt Lake City, for plaintiff and respondent.

PER CURIAM.

Defendant Kenneth Dee Bradley was convicted by a jury of aggravated assault, a third degree felony in violation of U.C.A. § 76–5–103 (1978 ed.), aggravated burglary, a first degree felony in violation of section 76–6–203, and tampering with a witness, a third degree felony in violation of section 76–8–508. He appeals from all three convictions claiming that the evidence adduced at trial failed as a matter of law to establish his guilt beyond a reasonable doubt, and that he cannot be convicted of both a lesser offense and a greater offense. We reverse in part and affirm in part.

During her separation from her husband Bill, Gina Rider dated Tom Bettwieser who had been investigated for theft of funds belonging to a partnership in which defendant and Tom Adams were partners and Bettwieser was an employee. Defendant was also a suspect in the theft. On the day of the theft, Bettwieser informed Gina that he had committed the theft. In the course of the investigation of the partnership, Gina was contacted by law enforcement officials, was subpoenaed as a witness, and was involved with Tom Adams' private investigation of the theft.

On December 24, 1982, Bettwieser arranged for Gina and her two children to move into a house managed by defendant at 11th East and 17th South in Salt Lake City. Bill and Gina Rider reconciled, and with defendant's approval, Bill moved into the house a day later with the understanding that in lieu of rent, the Riders would pay the utilities for the house and an attached locksmith shop. On the day Rider moved in, he and Gina had an argument in which defendant intervened. Rider threatened defendant and his stepson with a sawed-off shotgun, but later everybody apologized, and the Riders continued to occupy the home.

In the afternoon of January 27, 1983, defendant, "Spider" Wissink, and "Bett" Bettwieser, Tom Bettwieser's younger brother, drove to the Riders' home. The Riders, their two small children, and Gina's eighteen-year-old sister were at home. Rider was expecting defendant because he needed his signature on some social security papers. He opened the door for defendant, telling Gina that defendant was there. The three men entered, and Spider pulled Rider's shotgun from a rack on the wall, drew a pistol from his waist, and pointed it at Rider's head. He turned to defendant and asked, "What do you want me to do, boss? Do you want me to break some bones or blow them away?" Defendant answered that he thought the matter could be settled without violence. He then informed Gina that he was tired of her involvement with Tom Adams, that she had been talking too much and he wanted it stopped, and that he would "just as soon blow you away as look at you if it gets to it." The Riders' four-year-old girl became frightened and started screaming. Spider

told her that he did not want to hurt her daddy and that he was just doing his job. Defendant, at that point, ordered the Riders out of the house. Spider took Rider at gunpoint through the rooms to gather his belongings. When the Riders refused to use defendant's truck to move, he left and said he would be back at the end of the day. Rider called the police, who escorted the family out of the home.

At the end of the state's case in chief, defendant moved to dismiss the charges against him for the State's failure to meet its burden of proof. That motion was denied. In this appeal, defendant challenges the sufficiency of the evidence to support a verdict of guilty on all three charges. We view the evidence in a light most favorable to the jury verdict and do not disturb the jury verdict unless the evidence is so lacking and insubstantial that a reasonable man could not possibly have reached a verdict beyond a reasonable doubt. *State v. McCardell*, 652 P.2d 942 (Utah 1982). We apply that same standard to those facts that can be reasonably inferred from the evidence presented at trial. *State v. Griffin*, 685 P.2d 546 (Utah 1984).

I.

[1] In support of his claim that the evidence adduced at trial failed as a matter of law to establish his guilt beyond a reasonable doubt on the charge of aggravated assault, defendant contends that the statute interdicts the *use* of "a deadly weapon or such means or force likely to produce death or serious bodily harm." Defendant takes the position that it was Spider and not he who held the weapon and that the State entirely failed to prove assault against him. The trial court properly instructed the jury on aggravated assault and on assault as an attempt, with unlawful force or violence, to do bodily injury to another, or a threat of bodily injury to another accompanied by a show of immediate force or violence. U.C.A. §§ 76–5–102 and 103 (1978 ed.). It also instructed the jury that defendant could be held criminally liable for the conduct of another, as defined in section 76–2–202. *See also State v. Garcia*, 663 P.2d 60 (Utah 1983). The evidence delineated above was sufficiently substantial for the jury to find defendant guilty of aggravated assault.

[2–4] Defendant's challenge to the sufficiency of the evidence on the conviction of aggravated burglary is grounded *inter alia* in his claim that he did not enter the Rider premises unlawfully, and thus a crucial element of the crime of burglary was not established. Defendant overlooks the fact that a person is guilty of burglary "if he enters *or remains* unlawfully in a building ... with intent to commit ... an assault on any person." U.C.A. § 76–6–202 (1978) (emphasis added). In *State v. Brown*, 6 Kan.App.2d 556, 630 P.2d 731 (1981), the court, in defining a statute similar to Utah's, K.S.A. 21–3716, stated that "remaining within refers to the situation where defendant's initial entry is authorized, but at some later time that person's presence becomes unauthorized." *Id.* 630 P.2d at 735. Although it is true that Rider opened the door to defendant whom he expected to come to his house for a lawful purpose, his consent to defendant's entry was limited to that purpose and did not authorize defendant to order Rider out of the house at gunpoint. "[A] consent limited as to place, time, or purpose is not a defense where entry occurs outside the limitation stated or implied." *State v. Keys*, 244 Or. 606, 419 P.2d 943, 946 (1966) (citations omitted). *See also State v. Pierce*, 14 Utah 2d 177, 380 P.2d 725 (1963) (no consent where entry obtained through deception). The jury was well within its province in finding that defendant entered or remained unlawfully in the Rider home with the intent to commit an assault. Defendant's remaining point, that the jury was not instructed that defendant was an accomplice, is contradicted by the record as stated above.

[5, 6] Defendant next contends that the state failed to put on any *credible* evidence of a pending official proceeding or investigation to convict him of tampering with a witness. That argument is based on a faulty premise. The statute requires no more than that a defendant *believe* an offi-

cial proceeding or investigation to be underway. The jury was properly instructed on the elements set out in section 76–8–508. The Riders reported to the police officer on the day of the assault that defendant was angry because Gina had been talking to Tom Adams. It was for the jury to decide whether any credible inference could be drawn from that testimony that defendant wanted to stop Gina from involving herself with any official proceeding or investigation he believed was underway. The existence of contradictory evidence or conflicting inferences does not warrant disturbing the jury's verdict. *State v. Howell*, 649 P.2d 91 (Utah 1982).

II.

Finally, defendant claims that he cannot be convicted of both aggravated assault and aggravated burglary, because under the facts of this case, the greater crime is that of aggravated assault which is the basis of the lesser crime of aggravated burglary. In support he cites *State v. Hill*, Utah, 674 P.2d 96, 97 (1983), where this Court stated that "where the two crimes are 'such that the greater cannot be committed without necessarily having committed the lesser,' *State v. Baker*, Utah, 671 P.2d 152, 155 (1983), then as a matter of law they stand in the relationship of greater and lesser offenses, and the defendant cannot be convicted or punished for both." *See also* U.C.A. § 76–1–402(3) (1978 ed.).

Aggravated assault is a felony of the third degree, whereas aggravated burglary is a felony of the first degree, and thus we need to determine whether defendant could have committed the aggravated burglary without necessarily having committed the aggravated assault.[1]

In *State v. Hill*, *supra*, we stated that a secondary test was required where the crimes standing in a greater-lesser relationship have multiple variations. We must therefore consider the evidence to determine whether that relationship existed between the specific variations of the crimes actually proved at the defendant's trial.

[7] The elements of aggravated burglary proved at trial were that defendant (1) entered or remained unlawfully in the Riders' home (2) with the intent to commit an assault and that he (3) threatened immediate use of a deadly weapon. The elements of aggravated assault proved at trial were that defendant either (a) attempted with unlawful force or violence to do bodily injury to another; or (b) made a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or (c) carried out the attempt or threat by use of a deadly weapon. As can be seen, the elements of assault set out in (a) or (b) above are contained in (2) above (intent to commit assault), while the elements set out in (c), defining aggravated assault, are also contained in (3) above, defining aggravated burglary. Under the facts of this case, defendant should not have been convicted of aggravated assault as well as of aggravated burglary. § 76–1–402(3). As we stated in *State v. Hill*, *supra*, when a defendant has been improperly convicted of both the greater and the included offense, the conviction on the included offense is treated as mere surplusage and the conviction of the greater offense remains unaffected.

The conviction of aggravated assault is reversed and the sentence thereon vacated. In all other respects, the judgment on the verdict is affirmed.

ON PETITION FOR REHEARING

We granted rehearing to consider the State's argument that the aggravated burglary statute, Utah Code Ann. § 76–6–203 (1978), on its face does not require proof of the *acts* which make up the target offense of aggravated assault. All that is required by that statute, according to the State, is proof that a defendant *intended* to commit the target offense. Consequently, continues its argument, aggravated assault requires proof of more than all the facts required for proof of aggravated burglary, and defendant could have committed aggravated burglary without necessarily having committed aggravated assault. We

1. Defendant inadvertently reverses the order of the offenses.

have reviewed our decision on the reversal of defendant's conviction of aggravated assault because it stood in the relationship of a lesser and included offense of aggravated burglary, of which he was also convicted. We have decided, under the narrow factual circumstances of this case, that the reversal should stand, for the following reasons:

[8] As a theoretical proposition, a defendant could commit an aggravated burglary without committing an aggravated assault. Aggravated burglary may require no more than that the burglar be "armed with a deadly weapon." Utah Code Ann. § 76–6–203(c). Being armed with a deadly weapon in and of itself would not amount to an assault. However, aggravated burglary may also be accomplished when the burglar "uses or threatens the immediate use of a dangerous or deadly weapon against any person who is not a participant in the crime." Utah Code Ann. § 76–6–203(b). When that element is relied upon by the prosecution to prove aggravated burglary, aggravated assault is simultaneously proven. Utah Code Ann. § 76–5–103(1)(b).

[9] In the instant case, instructions given to the jury on aggravated burglary adopted the latter alternative, namely, that defendant "use[d] or threaten[ed] the immediate use of a dangerous or deadly weapon against any person." (This alternative was also employed in the charging information against defendant.) Instruction No. 16 directed the jury to find all of the following elements before it could convict defendant of aggravated burglary: (1) that defendant entered or remained in the building of Bill and Gina Rider; (2) that he did so unlawfully; (3) that he did so intentionally, knowingly, or recklessly; (4) that he did so with the intent to commit a felony, a theft, or an assault on Bill Rider or Gina Rider; and (5) that in attempting, committing, or fleeing from said burglary, defendant or another participant in the crime used or threatened the immediate use of a dangerous or deadly weapon against the Riders. When that instruction is compared to instruction No. 13, which defined the elements of aggravated assault, it is apparent that the jury did not have to find any additional elements for conviction of that crime beyond the elements of the crime of aggravated burglary. Instruction No. 13 on aggravated assault required the jury to find each and every one of the following elements: (1) that defendant assaulted Bill and Gina Rider; (2) that defendant then and there used a deadly weapon or such means or force likely to produce death or serious bodily injury; and (3) that defendant did so intentionally or knowingly or recklessly.

In this case, the State's evidence was that defendant with two companions entered Rider's home at Rider's invitation. One of the companions ("Spider") pulled Rider's shotgun from a rack on the wall, drew a pistol from his waist, and pointed it at Rider's head.

Since the jury was not required to find any additional elements to convict defendant of aggravated assault once it had found him guilty of aggravated burglary, we correctly affirmed the conviction of aggravated burglary, a first degree felony, and vacated the conviction of aggravated assault, a third degree felony, as being surplusage. As we observed in our earlier opinion in this case, "where the two crimes are such that the greater cannot be committed without necessarily having committed the lesser, then as a matter of law they stand in the relationship of greater and lesser offenses, and the defendant cannot be convicted or punished for both." *State v. Hill*, 674 P.2d 96 (Utah 1983); *State v. Baker*, 671 P.2d 152 (Utah 1983).

This result leaves defendant convicted of one first degree felony. As explained above, an information charging defendant with being armed with a deadly weapon under the count of aggravated burglary would have also subjected him to a conviction of aggravated assault, a third degree felony. Likewise, the State could have charged defendant with simple burglary, a second degree felony, which requires only an *intent* to commit an assault or felony, and with aggravated assault, a third degree felony, which requires an actual assault with a weapon. Under either of

those scenarios, defendant would have been properly convicted of both offenses. Under the actual charges in this case, aggravated assault constituted a lesser and included offense of aggravated burglary. Our decision thus stands.

STATE of Utah, Plaintiff and Respondent,

v.

Jerry Dee GRIFFITHS, Defendant and Appellant.

Nos. 860326, 860470.

Supreme Court of Utah.

Jan. 13, 1988.

Defendant was convicted in the District Court, Salt Lake County, Dean E. Conder, J., of aggravated robbery and aggravated assault, and defendant appealed. The Supreme Court, Hall, C.J., held that: (1) court did not err in refusing to give requested cautionary instruction regarding reliability of eyewitness identification; (2) defendant waived right to relief for prosecutor's failure to disclose defendant's statements made to arresting officer; (3) reversible error was not committed by admitting testimony of witness which revealed existence of outstanding warrant for defendant's arrest; and (4) testimony regarding significant change in defendant's appearance did not constitute error.

Affirmed.

1. Criminal Law ⇐785(1)

Decision whether to caution jury regarding reliability of eyewitness identification is matter within sound discretion of trial court.

2. Criminal Law ⇐829(16)

Court did not err in failing to give cautionary instruction regarding reliability of eyewitness identification, where defendant was identified as robber by each of his victims, victims' testimony was corroborated by compelling direct and circumstantial evidence of defendant's identity as robber, and court appropriately instructed jury on elements of offenses charged, prosecution's burden of proof beyond reasonable doubt, and role of jury in assessing credibility of witnesses, which covered the same substance.

3. Criminal Law ⇐412(4)

Defendant was not entitled to mistrial for State's failure to disclose to defendant until shortly before trial his statements made to arresting officer, where defendant did not move for continuance to which he would have been entitled; defendant waived right to relief by not making timely efforts to mitigate or eliminate prejudice caused by prosecutor's misconduct. U.C.A. 1953, 77-35-16(g).

4. Criminal Law ⇐1169.11

Reversible error was not committed by admission of witness' testimony which revealed existence of outstanding warrant for defendant's arrest in another unrelated matter, where witness' reference to warrant was very brief and only made in passing, testimony did not give details of circumstances which caused warrant to issue or of offense to which it was related, and court admonished jury to disregard testimony.

5. Criminal Law ⇐374

Court did not err in allowing witness to testify in robbery prosecution about significant change in defendant's appearance between time she saw him in store and time he appeared for lineup despite defendant's contention that testimony would leave impression that witness had been defendant's robbery victim in unrelated case, where court did not allow witness to describe circumstances of her encounter with defendant, and only by conjecture could conclusion be reached that witness had also been victim of defendant.